In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1924

JAMES R. HOFFA and BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL NO. 70, IBTCHWA,
Petitioners,

vs.

ROY C. HOFFMAN, DIRECTOR, REGION 20, NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Brotherhood of Teamsters and Auto Truck Drivers Local No. 70, IBTCHWA, and James R. Muniz, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 492 F.2d 929, and appears in the Appendix. No opin-

ion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 25, 1974. A timely petition for rehearing was denied on March 26, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May a labor organization and one of its officers be held in criminal and civil contempt of court orders where the court finds that the alleged contemnors were involved in a prohibited activity, absent proof that the accused were given actual notice of the injunction?

2. May a labor organization and one of its officers be held in civil and criminal contempt of court orders which did not in specific terms forbid secondary activity relating to stopping of deliveries?

3. Whether petitioners, charged with criminal contempt for an alleged violation of an injunction issued under the National Labor Relations Act, are entitled to a trial by jury under 18 U.S.C. §3692, which provides that alleged contemnors are entitled to a jury trial in all contempt cases "arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute."

4. Whether Article III, Section 2 and the Sixth Amendment to the Constitution mandate a jury trial where a penalty of $25,000.00 is assessed against a labor organization in a criminal contempt proceeding.

RULES AND STATUTES INVOLVED

Rule 65(d) of the Federal Rules of Civil Procedure provides:

> *Form and Scope of Injunction or Restraining Order.*
>
> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Title 18, United States Code, Section 3692 provides:

> *Jury trial for contempt in labor dispute cases*
>
> In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court.

United States Constitution, Article III, §2:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by jury . . . ."

United States Constitution Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

PRELIMINARY STATEMENT

This petition is filed on behalf of Teamsters Local 70 and one individual, James Muniz, its President. The facts are essentially uncontroverted. Both Local 70 and James Muniz were found in civil and criminal contempt of two United States District Court orders. The two court orders of which they were found in contempt were:

1. An order of February 13, 1970 prohibiting secondary boycott activity around Pier 45A in San Francisco, and entered against Local 21 of the International Typographical Union and Locals 85 and 287 of the Teamsters; and

2. An order of April 28, 1970 entered against Local 21 of the I.T.U., prohibiting consumer picketing in Marin County.

Neither of these injunctions named Local 70 or Muniz, and neither Local 70 nor Muniz was ever a party. Of equal significance is the fact that both injunctions arose under a specialized statutory provision permitting a District Court to grant an injunction *only* against a party against whom an unfair labor practice charge has been filed by the National Labor Relations Board. Neither Muniz nor Local 70 was charged with unfair labor practices, as had been the other parties to the injunction.

In summary, (1) neither Local 70 nor Muniz was a party to the unfair labor practice charges which gave rise to the injunction proceedings under 29 U.S.C. §160(l); (2) neither was a party or had notice of the injunction proceedings; (3) neither was named or had notice of, or was even served with the injunctions; and (4) neither was connected in any way with Locals 21, 85, 287, or any other parties to the litigation.

The total lack of notice of the provisions of the injunctions, and the fact that Local 70 and Muniz were not parties, not named, and not served is the central procedural and due process issue presented in this petition. Such lack of notice cannot be swept away by the District Court judge's remark "that it would be ridiculous to hold that Mr. Muniz . . . did not know about this order affecting one of his kindred Teamster unions. . . ." (R.T. 2728).

The issues which petitioners raise relate not only to the lack of actual notice of these injunctive decrees, but also to the fact that the injunctions were narrow and limited in scope, and did not apply to the activity

which the court found was contemptuous. Finally, petitioners raise the fundamental issue as to whether they were entitled to a jury trial, both because this was contempt arising out of a labor dispute and because the Constitution of the United States requires such a jury trial.

STATEMENT OF THE CASE

In early January, 1970, Local 21 of the International Typographical Union went on strike against the Independent-Journal, a daily newspaper in San Rafael, Marin County, north of San Francisco. Picketing by the I.T.U. began at the Independent-Journal's San Rafael printing plant, but in late January, spread to Pier 45A of the Port of San Francisco, where newsprint from Canada destined for the Independent-Journal was being unloaded from barges. It was to be transported to the printing plant in San Rafael, located twenty-five miles north. Longshoremen members of Local 10 of the International Longshoremen's & Warehousemen's Union respected the picket lines and refused to unload the newsprint from the ships to the dockside. Members of two Teamsters' locals—Local 85 of San Francisco and Local 287 of San Jose—became involved in the dispute at the pier. Members of Local 85 who operated forklifts at the dock refused to cross the picket lines to load the newsprint onto trucks, and similarly, members of Local 287 refused to haul the cargo to San Rafael in their trucks (C.T. 430-438).

The National Labor Relations Board obtained a temporary restraining order under 29 U.S.C. §160(l) against Local 21's picketing of the dock on February 11, 1970, on the basis that the picketing was an illegal secondary boycott.[1] 29 U.S.C. §158(b)(4)(i)(ii)(B). Simultaneously, an order to show cause was obtained which required Local 21 and Teamsters Locals 85 and 287 to show cause two days later why a preliminary injunction should not issue. The preliminary injunction was issued February 13, 1970 against these three labor organizations only, "enjoining further picketing at the pier and further acts designed to cause the neutral employers to refuse delivery of newsprint." (Opinion, App. p. iii)[2]

The activity involving newsprint at Pier 45A ceased, and no further action concerning that case continued in the District Court.

Local 21 shifted the focus of its activity to Marin County, where consumer picketing of stores which advertised in the Independent-Journal was commenced. On April 28, 1970, Local 21 entered into a stipulation with the National Labor Relations Board to a temporary injunction which prohibited Local 21 from picketing certain named retail stores and "other firms which advertised in the Independent-Journal, where an object of the picketing is, to cause customers of such firms to cease buying products not advertised in that

[1]This was Case C-70-306-LHB (N.D. Ca.)

[2]Local 10 of the I.L.W.U. became involved when it was served with the temporary restraining order on the day it was to expire—February 13.

paper." (C.T. 439-441).[3] This order was narrowly limited in its terms, and prohibited only attempts to induce customers not to shop at the various retail stores.

Throughout the summer and fall of 1970, the dispute between Local 21 and the Independent-Journal was quiescent. A new round of activity in Marin County erupted in the middle of October, and involved a new strategy on the part of Local 21. "The efforts broadened to boycott or quarantine San Rafael and all of Marin County, curtailing deliveries of all supplies, causing traffic tie-ups, and attempting to prevent delivery trucks from entering exit ramps from main highways to enter the city." (Opinion, App. A, p. v).

Litigation itself commenced in the federal courts on October 19. At that time, the National Labor Relations Board filed a petition seeking to hold the parties (Locals 21, 85, and 10, and their officers) to the previous injunctions in civil and criminal contempt. The petition claimed that "Respondents embarked upon a joint planned program and campaign to create a boycott of goods, materials, commodities and services. . . ." (C.T. 414). In contrast to the two previous situations, the effort organized by Local 21 was not directed at Pier 45A and the Independent-Journal newsprint, nor did it in any way involve a consumer boycott; rather, Local 21 sought simply to shut off truck deliveries to Marin County, the Independent-Journal, and persons doing business with the Independent-Journal.

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[3]This is Case No. C-70-895-WTS (N.D. Ca.)

Local 21's efforts to block deliveries in Marin County came to involve members of Local 70, the petitioner herein. Although its jurisdiction is Alameda County, its drivers, in the course of their work, make deliveries in Marin County and elsewhere around the Bay Area. The evidence was overwhelming as to Local 21's campaign to block deliveries and otherwise enforce a secondary boycott. There is also evidence in the record that drivers from not only Local 70, but also from all over the Bay Area, refused to cross the picket lines or to make deliveries in Marin County during the week and a half preceding the filing of the instant contempt petition. Local 70's involvement in the boycott scheme was, according to the National Labor Relations Board, reflected by the presence of James Muniz, the President of Local 70, and business agents in Marin County during the week and a half in which Local 21 established its picket lines.[4]

Swept into the events as accused contemnors were petitioners herein: James Muniz and Teamsters Local 70. Local 70 and James Muniz had never been made parties to the previous litigation, and were never served with copies of the injunctions. They were now dragged into the contempt litigation, which lasted throughout the remainder of 1970 and into 1971. No evidence was ever submitted that either James Muniz or Local 70 was ever told of the existence of the injunctions or of their terms. Notwithstanding these facts, Local 70 and James Muniz were found guilty and assessed penalties in the same manner as the other

[4]Brief of the National Labor Relations Board to the Ninth Circuit, pp. 20-21.

respondents who had been parties to the litigation since its inception.

At the conclusion of the trial, Locals 70, 21, and 85 were found guilty of criminal contempt, and the similar fines were imposed upon each of them: $25,000.00, with $15,000.00 to be remitted.[5] Muniz and officers of the other locals were placed upon probation. In addition to criminal contempt, Locals 70, 21, 85, and Local 10 were found guilty of civil contempt, and a civil penalty was imposed in the amount of $21,208.15.

All four labor unions and the individual contemnors appealed to the Ninth Circuit. The Ninth Circuit consolidated the appeals and affirmed the District Court without modification or reservation.

Local 10 has filed a petition for certiorari in the instant case, No. 1813, October Term, 1973. Locals 85 and 21 and their officers have chosen not to file a petition for writ of certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. A LABOR ORGANIZATION AND ONE OF ITS OFFICERS MAY NOT BE HELD IN CRIMINAL AND CIVIL CONTEMPT OF COURT ORDERS WHERE THE COURT FINDS THAT THE ALLEGED CONTEMNORS WERE INVOLVED IN A PROHIBITED ACTIVITY, ABSENT PROOF THAT THE ACCUSED WERE GIVEN ACTUAL NOTICE OF THE INJUNCTION.

Local 70 and James Muniz were first brought in as parties when they were served with the order to show cause in re contempt. The National Labor Relations

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[5]The Court bifurcated the proceedings. The criminal contempt was tried first, and the evidence applied to the civil contempt proceedings.

Board did not attempt to prove that they had either been served with the injunctions, or that they had actual knowledge of their existence.[6]

Although the District Court entered a finding that all respondents "had notice and knowledge of [the injunction]" (C.T. 1253), this was based not upon proof as to all respondents, but upon assumption. The Court stated:

> ". . . and I am also quite satisfied that all of these unions had notice and knowledge of the two court orders in question; Typographical Union 21 and Typographical Union 85, by direct service, which is not substantially in dispute, and Teamsters Local No. 70, not by direct service of notice, but otherwise by circumstantial evidence, in this case which leads the Court to believe that it would be ridiculous to hold that Mr. Muniz, who was president of Local 70 and over there on the ground taking an active part in it in connection with people from the other labor unions, didn't know about this order affecting one of his kindred teamster unions, so there is no doubt at all in the Court's mind about the violation of the Court order and about the fact that it was a violation that was made with knowledge." (R.T. 2728).

This language of Judge Sweigert on January 22, 1971, in pronouncing judgment is a simple admission that neither Muniz nor Local 70 had actual notice of the language or the intent of the court decrees.

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[6]Before the Ninth Circuit, the Board maintained that the Court could presume that Muniz and Local 70 knew of the injunction simply because others knew of the order. Brief of the Board, p. 46.

Although the Court of Appeals did not consider the notice problem which had been raised by appellants below, the opinion indicates that the Court of Appeals was confused: the Court assumed all parties before it had received direct notice of the injunction by being parties below prior to the initiation of contempt proceedings.[7]

The important issue raised in this petition is whether a labor organization and an individual may be held in contempt of court orders where actual notice is presumed because of the court's belief that they participated in the proscribed activities.

Within the bounds of Fed. R. Civ. P. 65(d), this Court has recognized injunctions which bind "successors and assigns" in addition to "parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them . . ." *Regal Knitwear Co. v. National Labor Relations Board,* 324 U.S. 9 (1945), *but cf. In Re Debs,* 158 U.S. 564, 570 (1895). Notwithstanding the fact that the injunction may by its terms bind others than the parties to the litigation, *actual notice* is a prerequisite to a finding of contempt, irrespective of whomever is named in the injunction. Rule 65(d). See *Ex Parte Lennon,* 166 U.S. 548 (1897). An injunction can operate only *in personam. Hitchman Coal & Coke Co. v. Mitchell,* 245 U.S. 229, 234 (1917).

[7]The Court of Appeals stated: "The language of the injunction was abundantly sufficient. Appellants were represented by counsel and no request for clarification was made." (Opinion, App. p. vi) This is of course patently untrue.

This Court must restrict the scope of injunctions within the plain meaning of Rule 65(d) to those with actual notice. Notwithstanding the cases that indicate that others than parties may be bound by an injunction, the rule still requires *actual notice*. The contrary result binds the entire world. Violation of the terms of an injunction without knowledge or notice simply subjects everyone to the penalties in contempt, irrespective of whether they have knowledge of the terms of the court decree. The most fundamental due process issue is thus raised by the imposition of civil and criminal penalties upon those who have no knowledge that their acts are, or might be, illegal.

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2. THE INJUNCTIVE DECREES IN THE DISTRICT COURT DID NOT IN SPECIFIC TERMS FORBID SECONDARY BOYCOTT ACTIVITY AFFECTING DELIVERIES, THE CONDUCT FOR WHICH MUNIZ AND LOCAL 70 WERE HELD IN CONTEMPT.

Two injunctions were issued by the District Court, each of which much be considered in turn.

The injunction of February, 1970 was directed solely at picketing at Pier 45A, and was designed to permit the Independent-Journal to receive its Canadian newsprint. The injunction itself prohibited secondary activities with respect to three companies: Powell River-Alberni Sales, Ltd.; Star Terminal Co., Inc.; and Garden City Transportation Co., Ltd., which were involved in the transportation of the newsprint from Canada to the San Rafael printing plant.

The temporary injunction issued by the District Court enjoined further picketing at the pier, and in-

sofar as it is relevant to the present case, also enjoined the named unions: "their officers, representatives, agents, servants, employees, attorneys, and all members, persons and other labor organizations acting in concert or participation with them [from] inducing or encouraging any individual employed by . . . any motor carrier, lift truck service company, or other person . . . to engage in a . . . refusal in the course of his employment . . . to perform any service . . . or . . . threatening, coercing or restraining said employers, or any other persons . . . where in either case an object thereof is . . . to force or require [the newsprint supplier] or any other person to cease doing business with [the Independent-Journal]." (C.T. 427-428).

The injunction of April 28, to which only Local 21 stipulated, was similarly drawn from a narrow mold. (C.T. 439-441). The prohibitory language is contained in four paragraphs, all of which deal with consumer appeals (see C.T. 440-441). The first two paragraphs enjoin picketing at retail stores for the purpose of causing customers of such stores to "cease buying products not advertised in the Independent Journal" (*ibid.*). The third enjoins appeals by "handbills, oral statements, or otherwise, in conjunction with picketing," for the purpose of causing customers "not to *patronize* the stores" (C.T. 441) (emphasis added). The fourth paragraph, in summary form enjoins threats, coercion and restraint against retail stores, "by *consumer* picketing or by any like or related acts of conduct," for the purpose of requiring the stores

to cease advertising in the Independent Journal (*ibid.*) (emphasis added). There is nothing in the language of the injunction which touches upon the inducement of employees of suppliers and delivery drivers, activity which is both different from and governed by an entirely separate set of regulations than those which apply to consumer appeals. See *N.L.R.B. v. Fruit & Vegetable Packers,* 377 U.S. 58. (1964).

Only the February 13 injunction, served upon Locals 85, 287, 21, and 10[8], can by a tortured extraction of three words out of the more than seven hundred words used in the injunction, be construed to prohibit picketing aimed at delivery drivers. The words which must be extracted from the factual context of the injunction, which on its face prohibited only picketing at Pier 45A are those words which refer to "any other person. . . ." (C.T. 428). Within the context of this injunctive decree, these words cannot be expanded beyond their contextual meaning, to prohibit secondary boycott activity in Marin County which involved delivery drivers six months later.

Local 70, whose work jurisdiction is Alameda County, in the course of this labor dispute found its members delivering goods throughout the Bay Area, including San Francisco and Marin County, during

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[8]Local 10 has filed a petition for certiorari, claiming that the service of the temporary restraining order of February 13 did not effect actual notice. See Docket No. 73-1813. Local 287 was not involved in the contempt proceedings. Locals 85 and 21, which had actual notice of the subsequent injunction, have not chosen to appeal from the decision of the court below.

October of 1970. The findings upon which the District Court based its contempt citation were based upon Local 70's alleged involvement in the *stopping of deliveries* to stores in Marin County which advertised in the Independent-Journal (C.T. 1249-62). The findings indicate that deliveries were stopped, with the purpose of "forcing or requiring the customers and suppliers of such persons to cease doing business with such persons in order to compel such persons to cease placing advertisements in, or otherwise cease doing business with, the Journal." (C.T. 1260). However, the injunctions themselves did not prohibit the stopping of deliveries, and it is here that the District Court erred.[9]

Although this issue was raised to the Court of Appeals below, the Court totally confused the specificity of these injunctions with respect to Local 70 and Muniz. The Court stated:

> "The language of the injunctions was abundantly sufficient. Appellants were represented by counsel, and no request for clarification was made." (Opinion, App., p. vi).

This was of course true with respect to Locals 21 and 85, but not true with respect to Local 70 and James Muniz, who were not parties to the litigation until October.

The injunctions of February 13 and April 28, 1970 cannot validly support contempt findings in this case

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[9]The Board, in its brief to the Court of Appeals, indicated that it also understood these injunctions to be of limited impact. (Brief, pp. 7-12).

against Local 70 and Muniz, unless their language plainly and unambiguously informs those with notice of the injunction that they prohibit picketing and related inducement to stop drivers from making deliveries to stores which advertise in the Independent-Journal.

> "It is settled law that contempt will not lie for violation of an order of the court unless the order is clear and decisive, and contains no doubts about what is required to be done." *N.L.R.B. v. Deena Artware,* 261 F.2d 503, 509 (6th Cir. 1958) *rev'd on other grounds,* 361 *U.S.* 398 (1960); *N.L.R.B. v. Express Publishing Co.,* 312 U.S. 426, 433 (1941); and Fed. R. Civ. P. 65(d).

The scope of an injunctive order must be read in the light of the particular facts and issues which gave rise to its issuance.

> "In contempt proceedings for its enforcement, a decree will not be expanded beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought, and the facts found must constitute a plain violation of the decree so read." *Terminal R.R. Ass'n v. United States,* 266 U.S. 17, 29 (1924).

Local 21's dispute with the Independent-Journal cut a broad path. Locals 85, 287, and possibly 10 were the subject of the first injunctive decree. Local 21 subsequently stipulated to a further decree. When the picketing erupted in the blocking of deliveries in Marin County, designed to bring the Independant-Journal to the bargaining table, the District Court

swept into its contempt proceedings Local 70 and James Muniz. The plain meaning of the injunctive decrees was expanded to include stopping of deliveries, and Local 70 was dragged into this dispute by a court which simply failed to recognize the limits of its own decrees. This Court is called upon not only to correct the patent error of the court below, but also to revitalize Rule 65(d). In the words of this Court in *International Longshoremen's Ass'n v. Philadelphia Marine Trades Ass'n*, 389 U.S. 64, 76 (1967):

> "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger in requiring [in Rule 65(d) of the Federal Rules of Civil Procedure] that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid . . . The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension."

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3. PETITIONERS WERE ENTITLED TO A JURY TRIAL IN A CONTEMPT ARISING OUT OF AN INJUNCTION GROWING OUT OF A LABOR DISPUTE.

Petitioners demanded a trial by jury on the allegations of criminal contempt. This was denied, and a court trial proceeded, in which the union and Muniz were found guilty and criminal penalties were assessed (R.T. 2731-34).

Petitioner submits that the denial of a trial by jury was a direct violation of the statutory require-

ment, 18 U.S.C. §3692, which provides in the relevant part:[10]

> In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

The importance of this statutory right to a trier of fact composed of a jury in a contempt matter arising out of a labor dispute cannot be overemphasized. Without a jury the judge is the lawmaker, the prosecutor, the injured party, and the trier of fact. Only a jury of twelve people can effectively insulate and protect an alleged contemnor from the wrath of the court particularly where the government itself is the initiating party. "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against a corrupt or overzealous prosecutor, and against a complaint, biased or eccentric judge." *Duncan v. Louisiana,* 391 U.S. 145, 156 (1965). This Court is simply asked to assure that right, which Congress granted in §3692.[11]

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[10]See also F.R.Crim.P. 42(b), expressly providing for the right to a trial by jury in contempt cases where a statute so provides.

[11]The question presented in this case is now before the First Circuit in *In Re Union Nacional de Trabajadores,* No. 74-1073. The Court issued an order on March 15, 1974 directing the United States Attorney to file a brief on the issue, and further directed the National Labor Relations Board to file a brief *amicus curiae* prior to April 2, 1974. This matter was on writ of mandamus, and no final order had been issued as of this date.

The Court of Appeals below erroneously interpreted §3692 to be inapplicable to the variety of labor dispute involved herein. The Court read the words "case involving or growing out of a labor dispute" to exclude contempts of injunction issued pursuant to the National Labor Relations Act. The issue presented to this Court is whether §3692 was intended to exclude contempts arising in this type of labor dispute between unions involved, the employer, and the National Labor Relations Board which obtained the injunction pursuant to 29 U.S.C. §160(1).

As will become apparent, it not only defies common sense to impose such a restrictive gloss on the words "labor dispute," but deprives working people and their labor organizations of their right to a jury trial under circumstances where it is most essential.

Section 3692, which provides on its face for a jury trial, is derived from §11 of the Norris-LaGuardia Act of 1932. 29 U.S.C. §111. The original statute was recodified in 1948, and became part of the Criminal Code. 62 Stat. 844. While the original section of Norris-LaGuardia had been limited to contempts "arising under this [Norris-LaGuardia] Act," the new codification eliminated this restriction.[12] When Congress chose in 1948 to remove the restriction of applicability to only those labor disputes arising un-

[12]This Court correctly interpreted the previous statute, 29 U.S.C. §111, to be inapplicable to all labor disputes one year prior to the recodification in 1948. *United States v. United Mine Workers*, 330 U.S. 258, 298 (1947). Cf. *McGuire Shaft & Tunnel Corp. v. Local Union No. 1791, United Mine Workers*, 475 F.2d 1209, 1215, n.12 (T.E.C.A. 1973) (not a labor dispute).

der Norris-LaGuardia, Congress also chose to express within the statute those circumstances where the right was to be excluded.[13]

This 1948 recodification of the Norris-LaGuardia section accomplished two purposes: (1) the scope of §3692 was broadened to include *all* labor disputes, rather than just those arising under the Norris-LaGuardia Act; (2) the guarantee of a jury trial was recodified into Title 18, *Crimes and Criminal Procedures.*

Because the prior §11 of Norris-LaGuardia was recodified as part of the Criminal Code, several courts have ruled that §3692 does not require a jury trial in *civil* contempt proceedings. See, *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.,* 380 F.2d 570, 579 (D.C. Cir. 1967); *cert denied,* 389 U.S. 327, 970 (1967); *Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, Local 1291,* 368 F.2d 932, 934 (3rd Cir. 1966), *rev'd on other grounds,* 389 U.S. 64 (1967); *Schauffler v. Local 1291, Int'l Longshoremen's Ass'n,* 189 F.Supp. 737 (E.D. Pa. 1960), *rev'd on other grounds,* 292 F.2d 182 (3rd Cir. 1961); and *cf. N.L.R.B. v. Red Arrow Freight Lines,* 193 F.2d 979, 980 (5th Cir. 1952) (Court of Appeals need not proceed with jury trial on contempt).

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[13]The second paragraph of the statute expressly exempts the following:

> This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court.

In the *Philadelphia Marine Trade Ass'n* case, the Third Circuit recognized the strength of petitioner's position:

> ". . . Congress in 1948 took the subject matter of 3692 out of the Norris-LaGuardia Act and made it part of the criminal code. The natural inference to be drawn from that action is that Congress intended the protections provided by 3692 to be accorded to defendants in criminal proceedings and that section is simply not applicable in cases of civil contempt in which the court is only to obtain compliance with an order." 368 F.2d at 934.[14]

The Ninth Circuit, although citing the above named cases, cryptically ignored them because they "pertain principally to civil contempts." (Opinion App. p. x).[15] The Court chose rather to impose a gloss upon the words "labor dispute" used in §3692. There can be no quarrel that a labor dispute was involved. Local 21 was on strike against the Independent-Journal. The National Labor Relations Board alleged that Local 10 and Local 85 were engaged in secondary boycott activity, first at the San Francisco pier and subsequently at Marin County stores. Petitioners herein, Local 70 and James Muniz, were charged with

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[14] *Accord, Brotherhood of Firemen v. United States*, 411 F.2d 312, 316-317 (5th Cir. 1969) ("The problem is formidable, with much on the Brotherhood's side.")

[15] The court below relied on *Madden v. Grain Elevator, Flour & Feed Mill Workers*, 334 F.2d 1014, 1020 (7th Cir. 1964), which arises in a civil contempt situation. The Seventh Circuit relied upon 29 U.S.C. 160(h), which exempts the National Labor Relations Act from the provisions of Norris-LaGuardia only in the *issuance* of injunctions or in the enforcement of Board orders before the Courts of Appeal.

violations of the injunctions, alleging that they had engaged in unlawful secondary boycott activity with respect to deliveries in Marin County. On its face, the term "labor dispute" used in §3692 must apply to this type of activity.[16]

This gloss upon the term "labor dispute" contradicts the plain meaning of the statute. But more importantly, the term "labor dispute" is used interchangeably and throughout both the Norris-LaGuardia Act and the National Labor Relations Act. Cf. 29 U.S.C. §§151, 152(a) and 164(c) with 29 U.S.C. §113(a), (b), and (c), and 29 U.S.C. §402(g). The National Labor Relations Board itself has recognized that the definition of a labor dispute used in the National Labor Relations Act is "substantially the same" as used in Norris-LaGuardia. *Tanner Motor Livery Ltd.,* 148 N.L.R.B. 1402, 1403 (1964), and *N.L.R.B. v. Washington Aluminum Co.,* 376 U.S. 9, 15 (1962). The short of the matter is that the term "labor dispute" in §3692 is known both to Norris-LaGuardia and to the National Labor Relations Act. Both statutes deal with problems arising out of labor disputes in the commonly understood meaning of the term, as well as any specialized meaning that it might be given. Under these circumstances, it defies common sense and the literal meaning of §3692 to deny a jury trial in this criminal contempt

[16]The courts have not applied §3692 to contempts arising out of violation of the Fair Labor Standards Act, *Mitchell v. Barbee Lumber Co.,* 35 F.R.D. 544, 547 (S.D. Miss. 1964), or violations of orders to specifically perform a collective bargaining agreement. *Philadelphia Marine Trade Ass'n v. Int'l Longshoremen's Ass'n, supra,* 368 F.2d at 934.

proceeding arising out of a labor dispute. But more critically, this action derogates the established principle of interposing a jury between the contempt power of the court and the prosecution in labor disputes.

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4. PETITIONERS WERE ENTITLED TO A JURY TRIAL IN THE CRIMINAL CONTEMPT PROCEEDING WHERE THE DISTRICT COURT IMPOSED A FINE OF $25,000.00.

The District Court imposed a fine of $25,000.00 upon Local 70, $15,000.00 of which was to be remitted if there were no subsequent violations of the court orders (R.T. 2731).

The issue, simply put, is whether the penalty imposed is so serious that a trial by jury is constitutionally required. With respect to criminal fines, this is an issue unsettled by this Court, and with respect to which the Courts of Appeals are in disagreement.

This Court has delineated the circumstances under which a trial by jury is constitutionally mandated in criminal contempt proceedings against persons. In *Cheff v. Schnackenberg,* 384 U.S. 373 (1966), the Court held that the Constitution does not require a jury trial where the accused individual is sentenced to six months' imprisonment. This doctrine was applied to the states in *Bloom v. Illinois,* 391 U.S. 194 (1968), to require the state to grant a jury trial where the contemnor was sentenced to a prison term of two years. Where there was no maximum penalty imposed by the statute, the trial court must "look to the penalty imposed as the best evidence of the serious-

ness of the offense." *Id.*, 391 U.S. at 211. Where the offense is serious, a jury trial is required; where it is petty, it is not. *Duncan v. Louisiana,* 391 U.S. 145, 162 (1968). Unwilling to "leave the federal courts at sea in instances involving . . . sentences," this Court, in the exercise of its "supervisory power, and under the peculiar powers of federal courts to revise sentences in contempt cases, [ruled] that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof." *Cheff v. Schnackenberg, supra,* 384 U.S. at 380. The Court recognized that this six-month line was imposed by 18 U.S.C. §1, which provides in relevant part:

> "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

The lower federal courts have now been clearly instructed in the right to a jury trial in criminal contempt situations where sentences are imposed. The court below recognized that "[w]here the contemnor is a corporation, association, union or other artificial person, and a fine is the ordinary punishment, the rules become obscure." (Opinion App. p. xvi). Where a fine is imposed, the rules are not only obscure, but the Courts of Appeals are in conflict. The Sixth Circuit has ruled, relying on *Duncan v. Louisiana, supra,* and *Columbia v. Cravens,* 300 U.S. 617 (1937), that the $500 limit of 18 U.S.C. §1 applies. *United States v. R. L. Polk & Co.,* 438 F.2d 377 (6th Cir.

1971).[17] The Court reasoned that it must apply "objective criteria," 438 F.2d at 380, and that the standard definition in 18 U.S.C. §1 defined the distinction between petty and serious crimes in the federal courts. *Accord, Frank v. United States,* 395 U.S. 147 (1969); and *Baldwin v. New York,* 399 U.S. 66, 73, n. 21 (1970). The Court of Appeals below rejected without comment the Sixth Circuit's holding,[18] and simply found that "the judgment of the District Court was [not] constitutionally prohibited." (Opinion App., p. xvi).

> The importance of this issue is again obvious. "[O]ver the years in the federal system, there has been a recurring necessity to set aside punishments for criminal contempt as either unauthorized by statute or too harsh. This course of events demonstrates the unwisdom of investing the judiciary with completely untramelled power to punish contempt, and makes clear the need for effective safeguards against that power abuse." *Bloom v. Illinois, supra,* 391 U.S. at 207.

When a local union such as Local 70, or a large corporation such as R. L. Polk & Co.,[19] can be subject to large fines without a trial by jury in criminal contempt circumstances is an issue which desperately

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[17]The First Circuit has indicated its support for the Sixth Circuit's position. *In Re Puerto Rico Newspaper Guild Local 225,* 476 F.2d 856, 858 (1st Cir. 1973).

[18]See App. p. vi at footnote 8.

[19]In the *Polk* case, the Court noted that the $35,000.00 fine was not significant in light of the contemnors' assets. In this case, the Court of Appeal below considered that the fine imposed "might be a 'serious' penalty. . . ." (App., p. xvi). The District Court, however, made no finding on this issue, nor was it considered.

needs resolution. See *United States v. United Mine Workers,* 330 U.S. 258, 303-304 (1947) (excessive fine), and *Anderson v. Dunn,* 19 U.S. (6 Wheat) 204, 231 (1821).

CONCLUSION

The fundamental issue raised in this petition is the extent to which government by injunction in labor disputes is to be countenanced. James Muniz and Local 70 were simply never given notice of the court decrees prohibiting unfair labor practices. The decrees themselves did not actually prohibit the activity of which petitioners were convicted. And finally with respect to the injunctive power of the District Courts, these alleged contemnors were deprived of the fundamental right of a trial by jury in a situation where that right plays a central role in basic due process.

For all the above reasons, this Petition for Writ of Certiorari should be granted.

Dated, San Francisco, California,
June 19, 1974.

VICTOR J. VAN BOURG,
DAVID A. ROSENFELD,
LEVY, VAN BOURG &
HACKLER,
Attorneys for Petitioners.

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

Roy O. Hoffman, Director, Region 20, NLRB, Plaintiff-Appellee, v. International Longshoremen's & Warehousemen's Union, Local No. 10, Defendant-Appellant.	No. 71-1818 No. 71-1819 No. 71-1820 No. 71-1821
Roy O. Hoffman, Director, Region 20, NLRB, Plaintiff-Appellee, v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, IBTCWHA, & James R. Muniz, Defendants-Appellants.	No. 71-1822 No. 71-1823 No. 71-1827
Roy O. Hoffman, Director, Region 20, NLRB, Plaintiff-Appellee, v. San Francisco Typographical Union Local No. 21, etc., Don Abrams; Brotherhood of Teamsters & Auto Truck Drivers Local No. 85, IBTCWHA; & Timothy J. Richardson, Defendants-Appellants.	No. 71-1828 No. 71-1829 No. 71-2073

[January 25, 1974]

Appeals from the United States District Court
for the Northern District of California

Before: MERRILL and TRASK, Circuit Judges, and KELLEHER,* District Judge

TRASK, Circuit Judge:

This is an appeal from two judgments holding appellant unions and union officers guilty of civil contempt and a portion of the appellants guilty of criminal contempt. The contempt actions were based upon alleged violations of two separate injunctions issued by the District Court under section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, hereinafter called the Act. Appeal is taken pursuant to 28 U.S.C. § 1291. We affirm.

California Newspapers, Inc., doing business as San Rafael Independent Journal (Journal), is engaged at San Rafael, California, in publishing a daily newspaper of general circulation in Marin County called *The Independent Journal.* Jurisdictional requirements of the Act with respect to gross revenues and interstate commerce are clearly present.

Since on or about January 7, 1970, a labor dispute had existed between the Journal and San Francisco Typographical Union No. 21 (Local 21), International Typographical Union, AFL-CIO.[1] In that month a

*Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

[1]In addition to the consolidated appeals from the District Court's orders finding appellants guilty of civil and criminal contempts which are at issue here, the unfair labor practice cases before the NLRB arising out of this controversy proceeded separately to final hearing and decision. San Francisco Typographical Union No. 21, 188 N.L.R.B. No. 108, 76 L.R.R.M. 1627 (1971). Local 21 and certain of its officers were cited for civil contempt in a companion case. The Board petitioned this court for enforcement of its order and Local 21 appealed the civil contempt citation.

strike was called against the newspaper and picketing began to the Journal's San Rafael publishing plant.

On February 11, 1970, the Regional Director of the National Labor Relations Board (the Board) filed with the District Court a petition for a temporary injunction pursuant to section 10(1) of the Act, against Local 21, Teamsters Local 85 and Teamsters Local 287. The petition was predicated upon a charge filed by the Journal that the named respondents were violating section 8(b)(4)(B) of the Act by engaging in secondary boycotts. Particularly they were picketing and inducing employees of various neutral employers at the Port of San Francisco to interfere with and prevent the delivery of newsprint to the Journal. After a hearing on February 13, 1970, at which the respondents presented no evidence, a temporary injunction was issued against all respondents enjoining further picketing at the pier and further acts designed to cause the neutral employers to refuse delivery of newsprint. On February 13, 1970, a Deputy United States Marshal served a copy of a Temporary Restraining Order identical with the Temporary Injunction on Longshoremen's Union, Local 10 which represented longshore employees at the Port of San Francisco. The injunction was based upon a finding that all three locals had engaged in a joint secondary boycott plan.

Those two appeals were consolidated, argued and decided by this court in NLRB v. San Francisco Typographical Union No. 21, 465 F.2d 53 (9th Cir. 1972).

On April 28, 1970, the Board filed a second petition charging that Local 21 was conducting illegal secondary boycott activities at entrances to various retail stores in the vicinity to induce the public not to patronize the stores because they were advertising in the Journal. Local 21 stipulated that it would not contest the facts charged, waived a hearing and consented to the issuance of an injunction forthwith as prayed for. The court considered the petition and issued the injunction on April 28, 1970.

Both the February 13 injunction and that of April 28 were directed to the named respondents and "their officers, representatives, agents, servants, employees, attorneys, and all members, persons and other labor organizations acting in concert or participation with them or any of them."

Notwithstanding the April 28 injunction Local 21 continued to picket the retail stores in substantially the same way. On May 28, 1970 after hearing, the court found Local 21 and certain of its officers and agents including its vice-president DeMartini and organizer Abrams in civil contempt and directed that they purge themselves, inter alia, by fully complying with the injunction order. The court retained jurisdiction for the purpose of imposing a compensatory fine and considering a compliance fine.

Despite the civil contempt order, the tempo of illegal activities in violation of both injunctions increased, with other locals participating. These included Longshoremen's Local No. 10; Teamsters No.

70 and James R. Muniz, its president; and Teamsters No. 85 and Timothy Richardson, its business manager. The effort broadened to boycott or quarantine San Rafael and all of Marin County, curtailing deliveries of all supplies, causing traffic tie-ups and attempting to prevent delivery trucks from entering exit ramps from main highways to enter the city.

On October 10, 1970, the petition in the present case was filed seeking adjudication in civil and criminal contempt for violations of both the February 13 injunction and that of April 28. At the outset of the hearing in the District Court the criminal and the civil cases were severed with the criminal to be tried first. A request for a jury trial in the criminal case was denied. On December 24, 1970, at the close of the hearing the District Court determined that the allegations of the petition had been proved beyond a reasonable doubt with respect to union appellants Local 21, Teamsters Local 70 and Teamsters Local 85, and individual appellants Abrams, Muniz and Richardson, and that those appellants were guilty of criminal contempt. The court also found that the allegations of civil contempt had been established by a preponderance of the evidence as to all of those guilty of criminal contempt, plus Longshoremen's Local 10 and individual appellant DeMartini. The order of December 24 with respect to the civil action contains certain standard purgation requirements in the way of notices, and imposes a compliance fine of $7,500 a day against the unions and $100 per day against individual appellants for each day such individual fails

to comply with the order. Finally, it retains jurisdiction for the purpose of imposing a compensatory fine.

In the criminal case a fine was levied against each of the three unions in the sum of $25,000 with a provision for remission of $15,000 of each fine if the court is satisfied at the end of one year with the appellants' compliance with the court's orders. Sentence of individual defendants was suspended and each was put on probation for one year. If probation was violated, each would subject himself to the power of the court to impose a sentence of imprisonment up to, but not exceeding, six months. A compensatory fine was later imposed in the sum of $21,208.15 in the civil proceeding.

Appellants raise a number of questions directed at the sufficiency and admissibility of evidence adduced during the proceeding, the inadequacy of the language of the temporary injunctions to put appellants upon notice of the activities within the scope of the injunctions, and the technical deficiency of certain of the pleadings. We have examined each in view of the importance of the proceeding and find that each is without substantial merit. Without detailing the evidence, which was voluminous, it clearly justified and supported the court's findings as to both criminal and civil contempts. The language of the injunctions was abundantly sufficient. Appellants were represented by counsel and no request for clarification was made. On the contrary appellants through their house papers boasted they were going to continue despite the court's injunctions. The same ap-

plies to the argument of the lack of precision of the allegations of the petition for an adjudication of criminal contempt. Appellants and their attorneys were fully apprised of the charges; they deliberately chose to risk not to obey them.

Where the purposes of issuing the citation for contempt is remedial in scope in order to enforce compliance with the court's order, the contempt is civil. *Shillitani v. United States,* 384 U.S. 364, 368-70 (1966). In such cases a jury trial is not required. *Shillitani, supra; Cheff v. Schnackenberg,* 384 U.S. 373, 377 (1966). No request for a jury trial was made in the civil contempt cases here. Where a fine is imposed or the purpose is punishment, the contempt is criminal. *Penfield Co. of California v. SEC,* 330 U.S. 585, 590-91 (1947); *Nye v. United States,* 313 U.S. 33 (1941). It is from the criminal contempt proceedings which imposed fines and probation that complaint is made of the denial of a jury trial.

The court has jurisdiction to grant injunctive relief or temporary restraining orders in order to protect the public welfare or preserve the status quo pending a hearing or to enforce its orders. We pointed out in *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d 541, 544, 545n.3 (9th Cir. 1969):

> "All that is required under Sec. 10(1) for a regional director to petition for such an injunction is reasonable cause to believe an unfair labor practice is being committed. The preliminary injunction should be granted by the court if the court finds that the factual allegations and the propositions of law underlying the regional di-

> rector's petition are not insubstantial and frivolous so that he has reasonable cause for believing the Act has been violated, and if the court finds that injunctive relief is appropriate. On appeal, review is limited to a determination of whether the district court's findings are clearly erroneous.
>
> . . . .
>
> "Neither the district court nor this court is called upon to decide whether in fact a violation of the Act has been committed; the ultimate determination with respect to this question is reserved exclusively for the Board, subject to review by the courts of appeals pursuant to Sec. 10(e) and (f) of the Act . . . ."

The court must also have the power to enforce its orders if the Act is to be effective. *Madden v. Grain Elevator, Flour & Feed Mill Workers,* 334 F.2d 1014 (7th Cir. 1964), *cert. denied,* 379 U.S. 967 (1965); *Evans v. Typographical Union,* 81 F.Supp. 675 (S.D. Ind. 1948).

Here the District Court, acting upon the petition of the Board, did grant injunctive relief under Section 10(1) of the Act, 29 U.S.C. §160(1).[2] When that injunctive relief was disregarded civil sanctions were imposed and when the court's orders were willfully flaunted and disobeyed criminal penalties followed.

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[2] "Whenever it is charged that any person has engaged in an unfair labor practice . . . the officer or regional attorney . . . shall . . . petition any United States district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law . . . ." 29 U.S.C. § 160(1).

In support of their contention that they were erroneously denied a jury trial, appellants rely upon 18 U.S.C. §3692, which reads as follows:

> "In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed."

Appellants acknowledge that the language represents a codification of the Norris-LaGuardia Act, in which the language granting contempt powers was originally limited to "all cases arising under this [Norris-LaGuardia] Act." Sec. 11, 29 U.S.C. §111. *See United States v. United Mine Workers,* 330 U.S. 258, 298 (1947). It is argued that a revision of 1948 (Act of June 25, 1948, ch. 645, 62 Stat. 701-02, 844), which provided that the contempt power extended to "all cases . . . arising under the laws of the United States . . .", necessarily is all inclusive and thus envelops within its scope the present NLRA controversy. Thus, the argument concludes, a jury is required if requested.

The thesis of appellants is too broad. Section 3692 does not stop when it refers to "all cases of contempt arising under the laws of the United States . . . ." It limits the definition by adding after the words "laws of the United States," the words "governing the issuance of injunctions or restraining or-

ders in any case involving or growing out of a labor dispute." The purposes of the Norris-LaGuardia Act to limit and restrict the equitable powers of the courts to intervene in labor disputes between private employers and unions are not the same as the powers involved in the administrative scheme of the Labor Management Relations Act and its amendments. There is no reason to believe that Congress intended its grant of equitable powers to district courts as embodied in section 10(1) of the Act, 29 U.S.C. §160(1), to be repealed by the recodification of section 11 of the Norris-LaGuardia Act, 29 U.S.C. §111, into 18 U.S.C. §3692. *Brotherhood of Local Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 380 F.2d 570, 580 (D.C. Cir.), *cert. denied*, 389 U.S. 327 (1967); *Madden v. Grain Elevator, Flour & Feed Workers*, 334 F.2d 1014, 1020 (7th Cir. 1964). *See Schauffler v. United Association of Journeymen*, 230 F.2d 572 (3d Cir.), *cert. denied*, 352 U.S. 825 (1956); *NLRB v. Red Arrow Freight Lines*, 193 F.2d 979 (5th Cir. 1952).

Although the authorities cited pertain principally to civil contempts we hold to the view that the jurisdiction of the district courts to enforce their orders made under section 10(1) of the Act applies as well to criminal contempts, and that a jury trial is not compelled by virtue of the provisions of 18 U.S.C. §3692.

Having thus concluded, it remains necessary to consider appellants' contention that the court erred in not summoning a jury upon request because of the

seriousness of the violations charged and the resulting weight of the penalties imposed. The trial court imposed two penalties in the criminal proceeding. As to the individuals it found guilty of criminal contempt, it suspended sentence and placed them on probation for one year, determining that if the condition of probation was broken they would subject themselves to the power of the court to impose a sentence of imprisonment of "up to but not exceeding, six months." It appears well established that jury trials are not constitutionally required in those cases where the penalty does not exceed six months' imprisonment. *Bloom v. Illinois,* 391 U.S. 194 (1968); *Cheff v. Schnackenberg,* 384 U.S. 373 (1966); *United States v. Barnett,* 376 U.S. 681 (1964); *Green v. United States,* 356 U.S. 165 (1958). *See also Duncan v. Louisiana,* 391 U.S. 145 (1968).

Cheff, supra, was an instance of criminal contempt of an order of the Court of Appeals of the Seventh Circuit arising out of proceedings before the Federal Trade Commission. Cheff was found guilty and sentenced to six months' imprisonment. His petition for certiorari was granted with review limited to the question whether after a denial of a demand for a jury, a sentence of imprisonment of six months was constitutionally permissible under Article III and the Sixth Amendment.[3] The Court held that it was.

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[3]"The Trial of all Crimes, except in Cases of Impeachment, shall be by jury . . . ." U.S. Const., art. III, § 2.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." *Id.,* amend. VI.

It stated that it was "constrained to view the proceedings" as "equivalent to a procedure to prosecute a petty offense" which under its decisions did not require a jury trial.[4] Clearly, then, it appears that sentences of imprisonment for a term of six months or less are neither constitutionally impermissible nor proscribed by the Supreme Court under its supervisory power over the inferior federal courts. We therefore hold that the criminal penalties meted out to the individual here in the form of suspended sentences and probation are not constitutionally invalid.

As to the appellant unions (Local 21, Local 85 and Local 70), each had imposed upon it a fine of $25,000. Payment of $15,000 of that sum was suspended for one year and was then to be remitted to the union upon a determination by the court that the union had not engaged in any further violations of injunction orders. The unions contend here that the amount of the fines establish them as other than "petty" in nature and therefore the denial of their requests for a jury trial was erroneous. The basis of this ar-

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[4]The Court referred to a portion of 18 U.S.C. § 1 (1964 ed.), "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months is a 'petty offense.'" 384 U.S. at 379.

It also concluded its opinion by an expression of its point of view in recognition of its responsibility for "effective administration" of the federal courts, stating:

> "Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof." *Id.* at 380.

gument is that the full text of 18 U.S.C. §(1)3 provides:

> "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

Since the Court in *Cheff* relied upon this statute for its characterization of a six months' maximum imprisonment as being "petty," appellants argue that the statute must necessarily determine the $500 fine as being the maximum fine which could permissibly be characterized as "petty" and thus imposed without a jury trial or a waiver of jury. Although there is a syllogistic allure in the argument, decisions subsequent to *Cheff* cast doubts upon the contention's validity. *Bloom v. Illinois, supra,* involved a conviction in an Illinois state court for criminal contempt and a sentence to imprisonment of 24 months as the penalty. The defendant's timely demand for a jury trial had been refused, and his conviction affirmed. Certiorari having been granted, 386 U.S. 1003 (1967), the Court reexamined the limitations of the rule that criminal contempts could be tried without a jury. *Duncan v. Louisiana, supra,* decided the same day as *Bloom,* had held that the right to a jury trial extended to the states.

In *Bloom,* the Court recounted that in *Green v. United States, supra,* it had held to be constitutionally permissible summary trials without a jury in all contempt cases, based upon common law rules and upon the concept that such power in the courts was consid-

ered essential to the proper and effective administration of justice. It then pointed out that *Barnett, supra,* had signalled a possible change of view in the event of a severe punishment in a criminal contempt case. Two years later, in 1966, *Cheff, supra,* held that six months' imprisonment was a petty and not a severe punishment and did not require a jury. The Court in Bloom stated that it "accept[s] the judgment of *Barnett* and *Cheff* that criminal contempt is a petty offense unless the punishment makes it a serious one."[5] 391 U.S. at 198. As to when the offense ceases to be "petty" and becomes "serious" the Court concluded:

> "In *Duncan* we have said that we need not settle 'the exact location of the line between petty offenses and serious crimes' but that 'a crime punishable by two years in prison is . . . a serious crime and not a petty offense.' " *Id.* at 211.

In this plethora of discussion establishing and reexamining rules as to when a jury trial is required, there is hardly a word spoken about the line at which the measure in dollars of a fine causes the contempt to cease being "petty" and to become "serious." Certainly we cannot understand *Cheff* as holding that the sum of $500 constitutes that line simply because it uses 18 U.S.C. §1(3) to express a point of division between permissible and impermissible terms of im-

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[5]The opinion in *Bloom* does not comment on the statement in *Cheff* that "sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof." 384 U.S. at 380. The implication is that such sentences are considered serious.

prisonment at which a jury is required.[6] A deprivation of his liberty for a period of more than six months could certainly be serious to any individual, whereas a fine of $500 to a large corporation or to a large union might have no deterrent or punitive effect at all.[7]

A distillate of the holdings of the more modern decisions of the Supreme Court on the question of the right to trial by jury in a criminal proceeding leads us to believe that if there is an existing statute which authorizes the imposition of a penalty of more than six months imprisonment, the penalty is not a "petty" one but a "serious" one and a jury or waiver thereof is required. *Duncan v. Louisiana, supra.* If the criminal proceeding is in contempt with no statutory penalty but an open-ended penalty resting on the court's discretion, a hindsight determination is made upon review to determine whether the offense was "petty" or "serious" based upon the severity of the punishment. If the penalty imposed is six months imprisonment or less, then the offense was a "petty" one and

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[6]In *Duncan*, the Court pointed out that because there was no statute involved in *Cheff* defining the penalty for criminal contempt in terms of months or years of imprisonment, the Court was forced to look at the penalty actually imposed as the best evidence of the seriousness of the offense. 391 U.S. at 162 n. 35.

[7]It is interesting to note that in *Cheff*, his codefendant Holland Furnace Co. was fined $100,000. Both Cheff and the corporation petitioned for certiorari. The petition of Cheff was granted and in the opinion the question of petty versus non-petty measured by length of imprisonment was discussed at length. The petition for certiorari of the corporation was denied and the Court in *Cheff* did not discuss a measure of dollars which might define a fine as being petty or serious.

no jury was required. *Cheff v. Schnackenberg, supra; Duncan v. Louisiana,* 391 U.S. 145, 162 n.35.

Where the contemnor is a corporation, association, union or other artificial person and a fine is the ordinary punishment, the rules become obscure. The Court has never said that while a $500 fine marks the contempt as being "petty" under 18 U.S.C. §1(3) with no jury required, a fine of $501 labels it as "serious" with the necessary consequence that a jury must have been enpaneled.[8] A fine which might under all of the circumstances constitute only a slap on the wrist of one artificial entity might be a "serious" penalty to another.[9] Accordingly, we can go no further than to decide this case, and upon that basis we do not find that the judgment of the District Court was constitutionally prohibited.

The judgment is therefore affirmed.

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[8]We note *United States v. R. L. Polk & Co.,* 438 F.2d 377 (6th Cir. 1971), to the contrary but are not persuaded by it.

[9]The six month-$500 provision of 18 U.S.C. § 1(3) defining the limits of "petty" offenses became law in 1930. Act of Dec. 16, 1930, ch. 15, 46 Stat. 1029. While the value of personal freedom has not depreciated in the intervening period the same cannot be said either of the value of the dollar or of the growth in dollars of the assets of large organizations.

United States Court of Appeals
for the Ninth Circuit

Roy O. Hoffman, Director, Region 20, NLRB, Plaintiff-Appellee, v. International Longshoremen's & Warehousemen's Union, Local No. 10, Defendant-Appellant.	No. 71-1818 No. 71-1819 No. 71-1820 No. 71-1821
Roy O. Hoffman, Director, Region 20, NLRB, Plaintiff-Appellee, v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, IBTCWHA, & James R. Muniz, Defendants-Appellants.	No. 71-1822 No. 71-1823 No. 71-1827 DC 70-895 WTS

[Mar. 26, 1974]

Before: MERRILL and TRASK, Circuit Judges, and KELLEHER,* District Judge

ORDER

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

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*Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the suggestions for en banc hearings, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.